SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 365.

BRANN & STUART COMPANY,
Petitioner,

v.

CONSOLIDATED SUN RAY, INCORPORATED,
Respondent.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Consolidated Sun Ray, Incorporated ("Sun Ray"), respondent herein, respectfully prays that the petition of Brann & Stuart Company for a writ of certiorari to the Supreme Court of Pennsylvania to review the judgment of that Court in the above-entitled mechanic's lien case in favor of the respondent, be denied for the reason that no federal question is involved therein.

On June 2, 1961, petitioner filed a scire facias sur mechanic's lien in the Court of Common Pleas Number 2 of Philadelphia County against respondent as lessee, and

Philadelphia Redevelopment Authority as owner, of a warehouse and land at Philadelphia, for an alleged balance due for a part of the construction of the said warehouse.

Both defendants in the mechanic's lien case denied liability.

As to Redevelopment Authority, the action was dismissed because of the public nature of the Redevelopment Authority (412 Pennsylvania 288, 1963).

As to Sun Ray, after many interim proceedings, including an unsuccessful attempt by the plaintiff to have the Administrative Judge give the case a special listing, the action came to trial in the Court of Common Pleas of Philadelphia County on *November 16, 1966—over five years after the date of the issue of the scire facias.*

At the beginning of the hearing, Sun Ray filed a motion to dismiss the action on the ground that since more than five years had passed since the scire facias was issued, the claim was lost.

The statutory provision involved was the Mechanics' Lien Act of June 4, 1901, P. L. 431, Section 10 of which (P. L. 435) provides inter alia that in the case of tenancies or leasehold estates a writ of scire facias must issue within two years and

> "* * * a verdict must be recovered or judgment entered on the scire facias *within five years* after it is issued. * * * If a claim * * * be not prosecuted in the manner and at the times aforesaid, *it shall be wholly lost.*"[1] (Italics ours.)

1. On August 24, 1963 a comprehensive new Mechanics' Lien Law was passed, section 701(d) of which law somewhat *shortens* the time for entering judgment to five years from the date of the *filing of the claim* instead of the *issuing* of the *scire facias* (P. L. 1175, 49 Purdon page 403), but both parties agree that the later Act does not apply to this case.

However, on the basis of a Monroe County (Pennsylvania) lower court decision, the trial judge overruled Sun Ray's motion to dismiss the action and proceeded to hear testimony offered by the plaintiff. At the close of the plaintiff's case, the defendant stood on its motion to dismiss previously made, and did not offer any evidence in defense.

Over a year later the trial judge filed an opinion and entered judgment in favor of the plaintiff and against Sun Ray.

Sun Ray appealed from this judgment to the Supreme Court of Pennsylvania on the basis of Section 10 above.

In its brief as appellant in the Supreme Court case, Sun Ray defined the "Questions Involved," as follows:

> "1. Under Section 10 of the Mechanic's Lien Law of 1901, may a mechanic's lien be maintained against a leasehold estate where no verdict has been recovered or judgment entered on the scire facias within five years from the date of the issue of the scire facias?"
>
> "2. May the five years' limitation be extended for the period of stays granted by the court because of defects in the claimant's pleadings or at the instance of the claimant itself?"
>
> "3. May the five years' limitation be extended for the period of claimant's unsuccessful appeal to the Supreme Court or its negligence in delaying the listing of the case for trial?"

In its brief as appellee in the Supreme Court case, Brann & Stuart Company defined the "Questions Involved," as follows:

> "1. Under Section 10 of the Mechanic's Lien Act of 1901, is the five-year period for recovery of a verdict on the scire facias a rigid requirement or a legis-

lative declaration of what constitutes due prosecution of the writ of sci. fa.?"

"2. Was there due prosecution by claimant of the writ of sci. fa. in this case?"

"3. Under Section 10 of the Mechanic's Lien Act of 1901, should the time during which stays of proceedings were granted by the court be deducted from the expired time with respect to the five-year period for recovery of a verdict on the scire facias?"

Obviously neither this statement nor this counterstatement contains the slightest claim that the case involves any state or federal constitutional question, nor does the brief of either party contain a single word or a single case relevant to any such claim.

The Supreme Court reversed the judgment of the Court of Common Pleas in an opinion reported at 433 Pennsylvania 574, and entered judgment in favor of Sun Ray. After citing a number of authorities, the opinion concludes, at page 577, as follows:

"The right to a mechanic's lien is purely a creature of statute and it is only available if the conditions of the legislature are strictly followed. Where the words of the statute are clear, the courts should not be requested to go beyond the requirements of the act to determine who was or who was not dilatory and responsible for the delay. It must be assumed that the legislature took delays, regardless of source, into account when it established the five year limitation. The statute must be followed whether strict or liberal, harsh or equitable."

There was a dissenting opinion by one Justice, joined in by one other Justice.

Brann & Stuart Company filed a petition for reargument in the Supreme Court of Pennsylvania, and therein for the first time argued that the refusal of the Administrative Judge of the Court of Common Pleas of Philadelphia County to grant to petitioner an emergency listing of the case for trial violated the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, section 11 of the Constitution of the Commonwealth of Pennsylvania (petition, page 38) and that the Court's interpretation of the five-year limitation in section 10 of the Mechanics' Lien Law of 1901 was repugnant to the Constitution of the Commonwealth of Pennsylvania (petition, page 39).

The Supreme Court of Pennsylvania denied per curiam Brann & Stuart's petition for reargument, and the present petition of Brann & Stuart for certiorari followed.

It is submitted respectfully that this attempt to make a federal case out of the exercise by the Administrative Judge of a court of his discretion whether to advance an individual case on the trial list over other cases awaiting trial, must fail, because it involves no federal issue.

The action of the Judge in charge of court administration in this individual case was not taken pursuant to any statute or any general order or rule of court or any general course of conduct or any reason other than that in the judgment of the Administrative Judge the state of the court calendar at the particular time and the history of the prosecution of the particular case involved made it improper after due consideration to put the case ahead of other cases awaiting trial.

To attempt on the basis of this completely individual situation to fashion a gigantic federal case involving the whole question of the adequacy of the administration of

law by the courts of the State of Pennsylvania is to attempt to create a spectacular constitutional issue far removed from the facts of this case—as a kind of bait to lure the Supreme Court into an investigation of a momentous problem not involved herein.

What is at issue here is only the question whether in the circumstances of this case the Act of 1901, on which the plaintiff had to rely completely to maintain any right at all to a mechanics' lien, permits an extension of time to secure a judgment beyond the five years specified in the Act.

The answer to that question depends entirely on the construction of the Act itself.

A claimant has no constitutional rights to a mechanics' lien except to the extent and on the terms and conditions prescribed in the Act.

These rights are given as prescribed therein to a specially selected class of contractors, *in addition to all other rights* at law and in equity which other contractors have—such as a right to an attachment, which the plaintiff in this case exercised.

As applied to this case those rights are subject to the condition that unless a judgment is obtained in five years from the time the scire facias issued, the right to a lien is lost.

Never has the constitutionality of such a limitation of an extraordinary remedy been brought into question. The reason is obvious: The right to a mechanics' lien is given only as a matter of the grace of the legislature and only on the terms and conditions it prescribes, namely, in Pennsylvania, completion of the action within five years.

That the Judge here acted in good faith is not denied by petitioner. In its petition for a stay of proceedings petitioner says:

> "4. * a Petition for Special Listing was dismissed by the Administration Judge on May 3, 1966, because it was found necessary to try certain urgent matters in preference to the trial in this case" (Record, 35a).

It is true that the Supreme Court of Pennsylvania said that the petition for special listing should have been granted, but no question has been raised as to the good faith of the Administrative Judge in this exercise of his judgment.

When, therefore, we examine on what petitioner bases its claim that the Supreme Court of the United States has jurisdiction in this case, we find that the statutory provision relied on is 28 U. S. C. A. Section 1257(3) (petition for writ of certiorari, page 2). That provision confers jurisdiction on the Supreme Court to review a judgment

> "* * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

Looking at the "Reasons for Allowance of the Writ", set forth on page 1 of the petition for certiorari, we find no allegation that the validity of the Act of 1901 is drawn in question on the foregoing ground.

The first reason given for allowance of the writ is that the five year period provided by the Act of 1901 is invalid because the trial court arbitrarily refused to list the case for trial when the plaintiff asked it to.

This complaint is not that the *statute is unconstitutional,* but that the trial court acted arbitrarily in refusing to list the case for trial.

The second reason given is that the State of Pennsylvania has not provided enough courts to permit the obtaining of a judgment within the required statutory period.

This, of course, does not question the constitutionality of the Act of 1901 or otherwise conform in any way to the requirements of 28 U. S. C. A. section 1257(3).

What the petitioner has attempted to do in this case is to construct on the slight foundation of the details of the administration of the trial calendar of a state court an imposing edifice questioning the adequacy of the judicial system of the State of Pennsylvania. A much more substantial foundation is required for such a weighty matter than exists in a consideration of the details of the housekeeping of the calendar of the Common Pleas Courts of Philadelphia. The Constitution of the United States never intended that the Supreme Court of the United States should control the action of a local court in fixing the relative priorities for trial of individual cases. It belittles the dignity of our highest court to attempt to throw the burden of such matters on it.

If, as petitioner says, the State of Pennsylvania has not met its obligation to suitors in Philadelphia by providing sufficiency of courts and judges, the solution does not lie in a reversal of the action of the Supreme Court of Pennsylvania in this case—if it is at all a matter for judicial determination. Much more investigation would be needed than is presented by the record here to determine whether the criticism is justified and what action the legislature of Pennsylvania should take.

Since the only matter here involved is a matter of law, it is not relevant to discuss the merits of the case itself, difficult as it is to pass in silence over the disagreeable and unfounded insinuations against Sun Ray and its counsel contained in the pleadings and arguments of petitioner. Not only did the defendant in this case do nothing to interfere with the progress of the case to trial, but by voluntarily waiving a jury trial right from the beginning of the action, it put the plaintiff in a position where it

easily could have brought the case to trial well within the liberal five-year period allowed by the Act of 1901, if it had prosecuted its claim with reasonable diligence.

Brann & Stuart still is in a position to proceed in the foreign attachment case against Sun Ray which involves the same alleged debt as is involved in the present case (brief for appellee, p. 14).

We respectfully ask that the petition for the writ of certiorari be denied.

Respectfully submitted,

MORRIS WOLF,
Counsel for Consolidated Sun Ray, Incorporated, Respondent.

Dated: August 13, 1969.